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Supreme Court of the United States

OCTOBER TERM, 1940

No. 898

INDEPENDENT WAREHOUSES, INC.,
Self-Insured Employer,
Petitioner,

vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

PETITION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DEPARTMENT.

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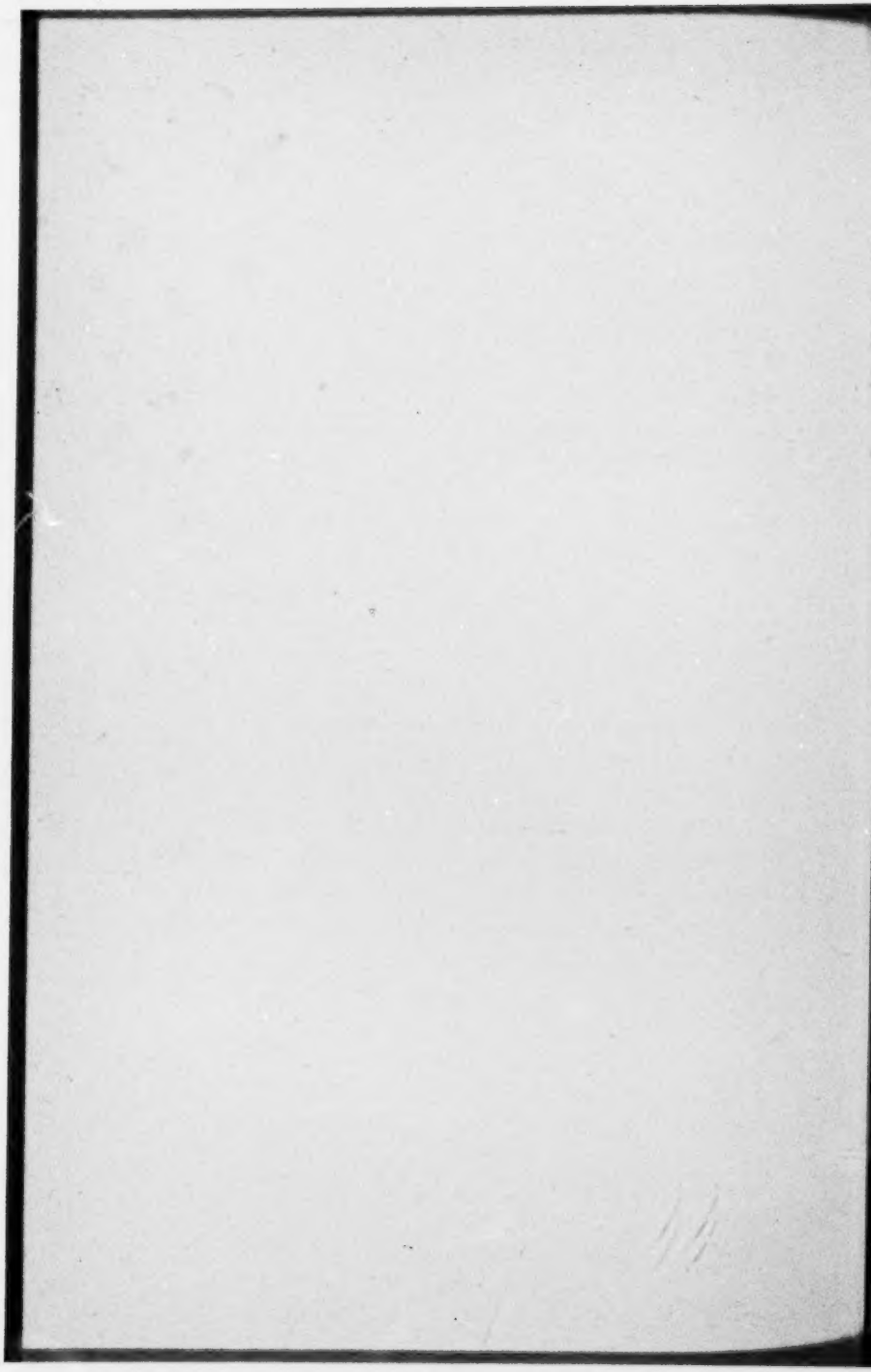

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Supreme Court of the United States

OCTOBER TERM, 1940

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vs.

REGINA CELESTE DIMINO, widow, on behalf of herself and minor child, JOSEPH LAWRENCE DIMINO, on account of the death of JOSEPH DIMINO, deceased, and STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DEPARTMENT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, INDEPENDENT WAREHOUSES, INC., Self-Insured Employer, a corporation organized under the laws of the State of New York, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled cause in the office of the Clerk of said Court on December 31, 1940 (R. 79) (284 N. Y. 481),

reversing the order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, entered on June 25, 1940 (R. 73) (259 App. Div. 942), which reversed the award of the State Industrial Board of the State of New York, entered on September 6, 1939 (R. 9), and the awards of the State Department of Labor, Bureau of Workmen's Compensation, entered on April 1, 1939 (R. 6, 7), awarding disability and death benefits to Regina Celeste Dimino, Respondent, on behalf of herself and minor child, Joseph Lawrence Dimino, on account of the death of Joseph Dimino, deceased.

Pursuant to the Remittitur of the Court of Appeals, entered on December 31, 1940 (R. 79), the records and proceedings in that Court were remitted to the Appellate Division of the Supreme Court of New York, Third Judicial Department, where an order on the Remittitur of the Court of Appeals was duly entered on January 28, 1941 (R. 80), and where the said record now remains. The State Industrial Board of New York entered an order on the Remittitur of the Appellate Division of the Supreme Court of New York, Third Judicial Department, on February 26, 1941 (R. 81).

Statement of Facts

Independent Warehouses, Inc., the Employer-Petitioner, (a corporation which transacts business in the New England, Middle Atlantic, Middle Western and Southern States) not only engages in warehousing operations, but also has charge of the operation of Pier 68, East River (a navigable river) in New York City. At said pier, Petitioner orders the number of stevedores needed to unload the ships (R. 33) and supervises the order and manner of unloading of newsprint rolls from the ships

(R. 37, 43-45, 55, 57, 60), performs the moving of said rolls from the stringpiece of the pier to trucks (R. 32) and the dispatch of said trucks (R. 31). Said trucks are owned and operated by United States Trucking Corporation (R. 40) (which is engaged in interstate transportation and which is a corporation affiliated with Independent Warehouses, Inc.). The ships arriving at said Pier 68, East River, are the "Malang", which comes from Bucksport, Maine, and the "Markland", which comes from Liverpool, Nova Scotia (R. 33, 34, 59). A ship would arrive at said pier each week loaded with newsprint rolls (R. 60) (destined for various newspapers in New York City, Hoboken, N. J., Jersey City, N. J., and New Brunswick, N. J.). Joseph Dimino, deceased employee, was employed by Independent Warehouses, Inc., as Pier Superintendent of said pier and had charge of the operation there on behalf of said company (R. 48, 59). Prior to the arrival of a ship, Dimino would receive a copy of the ship's plan, showing in which hatches of the ship the various newsprint rolls were located (R. 33, 34, 59), and the ship's manifest, which gave the number, weight and size of the newsprint rolls on the ship (R. 36-37). Dimino would then telephone the various newspapers and receive their orders (R. 33). He would then determine and order the number of stevedores needed to unload the ship (R. 33) and would also order the number of trucks required for transportation of the rolls (R. 33). The stevedores who unloaded the ships did so under the supervision of Dimino (R. 43-45, 55, 57). Dimino gave orders to the stevedores as to the order in which the hatches on the ship were to be unloaded (R. 37, 60). He also told the stevedores in what order the rolls were to be unloaded from the ship (R. 55, 57). The stevedores would not unload any of the newsprint rolls until they received orders from Dimino (R. 45, 55, 57). Dimino frequently was obliged to go on the ships to look into

the hatchways, whenever there was a delay in the unloading, to learn the reason for such delay (R. 48, 61). Dimino also conferred with the Mate of the ship whenever there was a delay in unloading (R. 49). In the course of his duties, Dimino often had to go on the ships to ascertain the location of the various newsprint rolls in the hatches, to see what rolls were in a position to be unloaded next and to ascertain what rolls were still in the various hatches of the ship (R. 36, 51, 52). Dimino's duties were not confined to the pier, but frequently compelled him to go on board the ship to perform his work (R. 48-49, 50, 57, 61). The information sought by Dimino upon the ship was not available on shore (R. 36, 50, 52). Whenever there were any changes in orders for newsprint rolls, Dimino would instruct the stevedores to change the manner of unloading accordingly (R. 37). It was testified that on September 27, 1938, he went on the ship, "Malang", and walked down a ladder into the hold of the ship to ascertain the number of rolls and the position of certain rolls in the hatch; that he examined certain rolls in one hatch and that while walking across the top of the hatchway to look for other missing rolls, he fell into the hatchway and sustained injuries resulting in his death on October 6, 1938 (R. 50).

Questions Presented

1. Whether the Employer-Petitioner may be held liable under the Workmen's Compensation Law of the State of New York to the widow and minor child of Joseph Dimino, for the death of Joseph Dimino, a Pier Superintendent, whose duties required him to order the number of stevedores needed to unload ships and to instruct the stevedores as to the manner and order of unloading said ships in navigable waters, and who re-

ceived fatal injuries while on one of said ships, in the performance of duties which compelled him to go on board said ship, and which were connected with and facilitated the unloading of said ship.

2. Whether Joseph Dimino was engaged in a maritime service on board a vessel in navigable waters at the time he sustained fatal injuries, which determination would deprive the State Industrial Board of jurisdiction and make Federal or Admiralty jurisdiction applicable to said case.

3. Whether the conclusions of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Dimino at the time he received his injuries, was not engaged in performing any work of a maritime character or nature and that said work bore no relation to navigation but was a matter of local concern, were unsupported by the evidence, and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

4. Whether the finding or conclusion of fact of the State Industrial Board, as approved by the Court of Appeals of New York, to the effect that Joseph Dimino had no direct supervision or control of the stevedores was unsupported by the evidence, and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

5. Whether the finding or conclusion of fact of the Court of Appeals of New York (which was contrary to the finding of the State Industrial Board) to the effect that there was nothing in the Record to show that the

information sought by Dimino upon the ship was not available on shore, was unsupported by the evidence and thus resulted in depriving Petitioner of a Federal right, by the determination that the State Industrial Board had jurisdiction of the case.

6. Whether the assertion of jurisdiction over the case by the State Industrial Board, as approved by the Court of Appeals of New York, is not contrary to the decisions of the United States Supreme Court and the lower United States Courts.

7. Whether the judgment of the Court of Appeals deprived Petitioner of its rights under Article I, Section 8, and Article III, Section 2, of the Constitution of the United States of America and under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903 (a), and whether said judgment was in violation of said provisions.

Rulings of the Courts Below

The State Department of Labor, Bureau of Workmen's Compensation, and the State Industrial Board of the State of New York made awards of disability and death benefits to Respondent, Regina Celeste Dimino (R. 6, 7, 9). The State Industrial Board found that at the time of his injuries, Dimino was not engaged in performing work of a maritime nature and that said work bore no relation to navigation, but was a matter of local concern; and that Dimino had no direct supervision or control of the stevedores; and that his presence on the ship was incidental to his employment on the dock and arose out of problems connected with such work (R. 4). The State Industrial Board also found that it was necessary for Dimino to board the ship to

perform his duties, as that was the only way he could ascertain the amount and location of certain rolls on the ship (R. 15).

Petitioner appealed to the Appellate Division of the Supreme Court of New York, Third Judicial Department, which Court by an order, entered June 25, 1940, reversed the awards of the State Industrial Board and dismissed the claims on the ground that Dimino was engaged in a maritime service on navigable waters at the time of his injuries and thus the State Industrial Board had no jurisdiction (R. 73). Presiding Justice Hill and Justices Bliss, Schenck and Foster concurred in the decision; while Justice Crapser dissented (R. 72) (259 App. Div. 942).

Respondents appealed to the Court of Appeals of the State of New York, which Court by an order, entered December 31, 1940, reversed the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirmed the awards of the State Industrial Board (R. 79). The opinion was given by Judge Loughran, and was concurred in by Judges Finch, Rippey, Sears and Lewis. However, Chief Judge Lehman and Judge Conway dissented (R. 76) (284 N. Y. 481). The Court held that the State Industrial Board had jurisdiction over the case and that the State Industrial Board was correct in finding that Dimino had no direct supervision or control of the stevedores (R. 77), and that Dimino at the time of his injuries was not engaged in performing any work of a maritime nature and said work bore no relation to navigation, but was a matter of local concern (R. 78). The Court also stated that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on the shore (R. 77).

Jurisdiction

Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals of the State of New York by:

Judicial Code, Section 237 (b), 28 U. S. C. A. Sec. 344 (b) (Appendix);

Constitution of the United States of America, Article III, Section 2 and Article I, Section 8, (Appendix);

Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903 (a), (Appendix).

The judgment of the Court of Appeals of the State of New York, entered on December 31, 1940, (R. 79) is final and is the judgment of the highest court of the State of New York in which a decision in this matter could be had. This petition for a Writ of Certiorari is filed with this Court within the period prescribed in *28 U. S. C. A., Sec. 350.*

The Court of Appeals, in reversing the order of the Appellate Division of the Supreme Court, Third Judicial Department, and affirming the awards of the State Industrial Board, held that Joseph Dimino, deceased, at the time he sustained his fatal injuries, was not engaged in performing any work of a maritime nature; that said work bore no relation to navigation, but was a matter of local concern; and that the State Industrial Board had jurisdiction (R. 78) (284 N. Y. 481). The Appellate Division of the Supreme Court of New York, Third Judicial Department, in reversing the awards of the State Industrial Board and dismissing the claims, held that Dimino was engaged in a maritime

service on navigable waters at the time of his injuries and thus the State Industrial Board had no jurisdiction (R. 73) (259 App. Div. 942). The State Industrial Board found that at the time of his injuries, Dimino was not engaged in performing work of a maritime nature and that said work bore no relation to navigation, but was a matter of local concern (R. 4).

The Petitioner's contention, urged from the inception of this proceeding before the State Industrial Board, and before the Appellate Division of the Supreme Court and the Court of Appeals, was that the case did not fall within the jurisdiction of the State, but came under Federal or Admiralty jurisdiction, since Dimino was engaged in work of a maritime nature on a vessel in navigable water at the time of his injuries (R. 11-14, 21, 24, 26, 29, 53, 66-69).

The decision of the question of whether Dimino was a maritime employee or not, and whether his case came under the jurisdiction of New York State or under Federal jurisdiction was necessary to the determination of said case (R. 4, 11-14, 21, 24, 26, 29, 52-53, 66-69, 73, 76). Said question was actually decided by the Court of Appeals (R. 76), and there was no non-Federal ground broad enough to sustain said judgment.

The above facts show that questions of Admiralty and Federal jurisdiction are necessarily involved in this case and that this Court has jurisdiction to review the judgment of the Court of Appeals under the statutory and constitutional provisions above cited. Said judgment deprived Petitioner of a Federal right.

In its briefs and argument before the Appellate Division of the Supreme Court and the Court of Appeals, Petitioner claimed that the following Conclusions of Fact of the State Industrial Board were unsupported by the

evidence; (a) That at the time of his injuries, Dimino was not engaged in performing any work of a maritime nature and said work bore no relation to navigation, but was a matter of local concern; (b) That Dimino had no direct supervision or control of the stevedores. Said conclusions of fact were also found by the Court of Appeals. The State Industrial Board found that it was necessary for Dimino to board the ship in order to perform his duties (R. 15), while the Court of Appeals stated that there was nothing in the record to show that the information sought by Dimino upon the ship was not available on shore (R. 77). Petitioner urged before the State Industrial Board, the Appellate Division of the Supreme Court and the Court of Appeals in briefs and argument that Dimino's duties required him to go on board the ship (R. 66, 68).

The Appellate Division of the Supreme Court by a four to one decision supported Petitioner's contentions and reversed the awards and dismissed the claims (R. 72). The Court of Appeals by a five to two decision reversed the order of the Appellate Division of the Supreme Court and affirmed the awards (R. 76).

A review by this Court of the above findings of fact in the decision of the Court of Appeals is sought, since Federal rights have been denied to Petitioner as a result of said findings, shown by the Record to be without evidence to support them, and since the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, for this Court to analyze said facts.

Reasons for Granting Writ of Certiorari and Specification of Errors.

1. The Court of Appeals in this case has decided

a Federal question of substance not theretofore determined by this Court. There is no case on record in the United States Supreme Court involving a set of facts such as are contained in this case,—namely, a Pier Superintendent, whose duties required him to order the number of stevedores needed to unload ships and to instruct the stevedores as to the manner and order of unloading said ships in navigable waters, and who received fatal injuries while on one of said ships in the performance of duties which compelled him to go on board said ship, and which were connected with and facilitated the unloading of said ship. Thus the United States Supreme Court in the exercise of its discretion should grant a Writ of Certiorari, in order that this Court may determine this question. This will then settle the law as to such Pier Superintendents, not only in New York City, but also in all parts of the United States.

2. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court regarding stevedores. Dimino's duties, like a stevedore's, were partly on land and partly on ships in navigable waters. Both Dimino and a stevedore had duties which had to do with the unloading of ships in navigable waters. *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, held that a stevedore's employment is maritime. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, held that if a stevedore is injured on board a vessel in navigable waters, his case comes within Federal or Admiralty jurisdiction, and cannot come within State jurisdiction.

3. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court and the lower United States Courts, when it relied for

its decision partly on *Grant Smith-Porter Co.* v. *Rhode,* 257 U. S. 469. Said case was distinguished from a case like the *Dimino* case by *John Baizley Iron Works* v. *Span,* 281 U. S. 222, where the Court said (pp. 230-1): "In *Grant Smith-Porter Co.* v. *Rhode,* supra, claimant when injured was working upon an incompleted vessel—a thing not yet placed into navigation and which had not become an instrumentality of commerce." In the *Dimino* case the vessel, on which he was injured, was completed and was actually in navigation and commerce.

Matter of Doey v. *Howland Co.,* 224 N. Y. 30, certiorari denied, 248 U. S. 574;

Union Oil Co. v. *Pillsbury,* 63 Fed. (2d) 925;

Puget Sound Nav. Co., et al. v. *Marshall,* 31 Fed. Supp., 903 (U. S. District Court, W. D. Washington, N. D., Feb. 8, 1940).

4. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court, and the lower United States Courts, when it relied for its decision partly on *Miller's Indemnity Underwriters* v. *Braud,* 270 U. S. 59. A decision of this Court distinguishes the *Braud* case from the situation presented in the case at bar. *John Baizley Iron Works* v. *Span,* supra, stated (p. 231) that Braud's work had only remote relation to navigation or commerce. *Merchants' & Miners' Transp. Company* v. *Norton,* 32 Fed. (2d) 513, stated (p. 515) that Braud was not injured "upon navigable waters", in the words of the Act of Congress, but under water on land belonging to the State.

5. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it relied for its

decision partly on the case of *Rosengrant* v. *Havard*, 273 U. S. 664,—the facts of which are distinguishable from the *Dimino* case, as is shown by the cases of *Moss Tie Company, et al* v. *Tanner, et al.*, 44 Fed. (2d) 928, and *Norton* v. *Gulf Refining Co.*, 94 Fed. (2d) 380, 381, certiorari denied, 304 U. S. 566.

6. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it held that Dimino's work was a matter of local concern. Dimino's work was closely connected with the unloading of ships and the facilitating of the ships' work, and such duties have been held by the following cases not to be of local concern:

Moss Tie Company, et al. v. *Tanner, et al.*, supra;

Employers' Liability Assurance Corp. v. *Cook*, 281 U. S. 233, 236;

United States Fidelity & Guaranty Co. v. *Lawson*, 15 Fed. Supp. 116, 122;

Northern Coal & Dock Company v. *Strand*, 278 U. S. 142, 144;

Martinson v. *State Industrial Accident Commission*, 60 Pacific (2d) 972, 973, 154 Or. 42, certiorari denied, 300 U. S. 659.

7. The Court of Appeals decided this case in a way contrary to applicable decisions of this Court and the lower United States Courts, when it held that Dimino's work bore no relation to navigation and was not maritime in nature. The following cases hold that the unloading of a ship, or services facilitating the performance by a ship of her duties, have a direct relation to navigation and commerce and are of a maritime nature:

Moss Tie Company, et al. v. *Tanner, et al.*, supra, at p. 930;

Northern Coal & Dock Company v. *Strand*, supra, at p. 144;

Martinson v. *State Industrial Accident Commission*, supra, at p. 973;

Robinson v. *The C. Vanderbilt*, 86 Fed. 785, 789.

8. The Court of Appeals decided this case in a way contrary to the applicable decisions of this Court and the lower United States Courts which hold that th fact that an employee works partly on land and partly on a vessel in navigable waters does not prevent his work from being maritime, if he is injured on a ship in navigable waters.

Employers' Liability Assurance Corp. v. *Cook*, supra, at p. 236;

Norton v. *Gulf Refining Co.*, supra;

Northern Coal & Dock Company v. *Strand*, supra, at p. 144;

Merchants' & Miners' Transp. Company v. *Norton*, supra.

9. A Federal right of the Petitioner has been denied as a result of the following findings by the Court of Appeals, shown by the Record to be without evidence to support them: (1) That Dimino had no direct supervision over the stevedores; (2) That there was nothing in the Record to show that the information sought by Dimino upon the ship was not available on shore (which latter finding is expressly contrary to the finding of the State Industrial Board that Dimino's duties compelled him to go on the ship and that he could not have per-

formed them without going on board the ship). The conclusion of law depriving Petitioner of said Federal right and the above findings of fact are so intermingled as to make it necessary for this Court to analyze the facts, in order to pass upon the Federal question.

10. The judgment of the Court of Appeals deprived Petitioner of its rights under Article I, Section 8, and Article III, Section 2, of the Constitution of the United States of America and under Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., Sec. 903(a), and said judgment was in violation of said provisions.

11. The Court of Appeals deprived the Petitioner of a Federal right by ruling that the Workmen's Compensation Law of the State of New York (Chap. 615, Laws 1922, as amended) applies to this case.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, commanding said Court to certify and send to this Honorable Court for its review and determination the full and complete transcript of the Record and all proceedings in this case, so that said judgment of the Court of Appeals of the State of New York may be reviewed and reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

INDEPENDENT WAREHOUSES, INC.,
Petitioner.

By JOHN ROSS LAUER,
Attorney for Petitioner.

State of New York,
County of New York, ss.:

JOHN ROSS LAUER, being duly sworn, deposes and says that he is the attorney for the Petitioner herein; that he has read the foregoing Petition and knows the contents thereof; that the same is true to his own knowledge, information and belief; and that his knowledge is derived from the Record in the case and from the proceedings in the Courts heretofore had herein.

JOHN ROSS LAUER.

Sworn to before me this
26th day of March, 1941.

EDWARD T. CUNNINGHAM,
Notary Public, Queens County
Queens Co. Clk's No. 442, Reg. No. 2979
N. Y. Co. Clk's No. 764, Reg. No. 2C 460
Kings Co. Clk's No. 195, Reg. No. 2317
Commission Expires March 30, 1942.